United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 77-7210

77-7244

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

against

S. S. TORONTO, her engines, etc., WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,

Defendants, Third-Party Plaintiffs-Appellees,

against

PITTSTON STEVEDORING CORP.,

Third-Party Defendant-Appellant.

On Appeal by Third-Party Defendant from Final Judgment in Favor of Defendants, Third-Party Plaintiffs Against Third-Party Defendant

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BRIEF FOR PITTSTON STEVEDORING CORP., THIRD-PARTY DEFENDANT-APPELLANT

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

SYMMERS, FISH & WARNER,
Attorneys for Third-Party Defendant-Appellant,
345 Park Avenue
New York, New York 10022.
751-6400

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BRIEF FOR PITTSTON STEVEDORING CORP., THIRD-PARTY DEFENDANT-APPELLANT

Issues Presented for Review

1. Is the conclusion that shipowner's litigation with plaintiff is not a claim encompassed within the release of Pittston by shipowner supported by the evidence and the applicable law?

2. Is the conclusion that shipowner's action or inaction neither caused the loss nor prevented the recovery of the coffee supported by the evidence and the applicable law?

Statement of the Case

Plaintiff, consignee of a shipment of coffee carried from Assab, Ethiopia, to the Port of New York in the TORONTO and discharged at the Port of New York in September 1971, instituted an action in the United States District Court for the Southern District of New York on 3 August 1972 against the TORONTO in rem and her owners and operators in personam (shipowner), seeking recovery of $45,000 for alleged non-delivery of 781 bags, out of a total shipment of 2,099 bags of coffee under two Bills of Lading (complaint, 4a).* On 9 April 1973, pursuant to an order obtained by defendants permitting filing of a third party complaint, defendant shipowner filed a third party complaint against the discharging stevedore at New York, Pittston Stevedoring Corp. (Pittston), for indemnity, reasonable counsel fees, costs and disbursements (third party complaint, 14a). Third party defendant Pittston denied knowledge or information of the facts alleged in the complaint, and, in answer to the third party complaint, denied liability and alleged as an affirmative defense, among others, that "defendants and third party plaintiffs (shipowner) for a valuable consideration duly executed and delivered to third party defendant (Pittston) a general release in writing whereby defendants and third party plaintiffs duly released the third party defendant and forever discharged it from the alleged claim set forth in the third party complaint." Pittston also counter claimed against shipowner for indemnity "if it be found that any loss or damage was sustained by the shipments in question while on board or while being discharged from the TORONTO, due to the manner of loading, stowing or discharging the cargo." (Answer to Third Party Complaint, 18a).

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* "a" references are to the Joint Appendix.

Pittston moved for summary judgment dismissing the third party complaint against it on the ground that by release between shipowner and Pittston dated 13 November 1972 (i.e. more than three months after plaintiff had brought suit against shipowner in this matter and about five months before Pittston was impleaded as a third party defendant), shipowner had released Pittston from liability for indemnity with reference to certain specified cargo claims and "any other cargo claims filed against (shipowner) up to November 13, 1972" (Pittston's motion for summary judgment, 33a). Shipowner opposed the motion and the Hon. Sylvester J. Ryan at first granted Pittston's motion on 8 March 1974 ordering that "judgment is directed to be entered by the Clerk forthwith, dismissing the complaint against the third party defendant with prejudice" (memorandum order, Ryan, J. 64a); on motion for reargument, sought by shipowner (shipowner's motion for reargument, 68a), Judge Ryan, by order filed 4 April 1974, vacated his aforesaid order granting summary judgment to third party defendant, on the ground "that a genuine issue of fact exists as to the inclusion of the subject matter of the above entitled action in the release" and on the issue of cutting off a direct claim of plaintiff against third party defendant (memorandum order, Ryan, J., 70a).

The action was tried before the Hon. William C. Conner on 1 July 1976 (89a). Opinion No. 45,648, was filed 1 March 1977 (246a). Briefly, Judge Conner ruled that (1) there was no direct claim of plaintiff against Pittston, (2) plaintiff was entitled to judgment against shipowner in the sum of $44,422.44, plus interest and costs, and (3) shipowner was entitled to judgment against Pittston [for indemnity] in the amount paid to plaintiff, together with costs, reasonable attorney's fees and disbursements. A "final" judgment No. 77425 was entered on 24 March 1977 in favor of plaintiff and against shipowner in the total

amount of $58,279.83 (267a), from which shipowner filed a notice of appeal on 25 April 1977 (273a). A final judgment No. 77517 was entered on 19 April 1977 in favor of shipowner against Pittston in the total amount of $60,-348.00 (271a), from which Pittston filed a notice of appeal on 18 May 1977 (275a). Thereafter, shipowner withdrew its appeal which was filed on 25 April 1977. The appeal (275a) before the Court is solely that of Pittston from the judgment entered against it in favor of shipowner (271a).

Statement of Facts

On 2 August 1971, at the port of Assab, Ethiopia, 2,099 bags of coffee bearing the marks A. B. Gimbi Handpicked and consigned to the order of the plaintiff, were received for shipment to New York/option Baltimore, aboard the TORONTO under clean bills of lading No. 5 (998 bags) (331a) and No. 6 (1,101 bags) (333a) issued by shipowner. According to the hatch list (409a) and stowage plan (411a), prepared by TORONTO's Chief Mate by reference to Mate's receipts and tally slips (136a-137a) and the ship's manifest (342a, 630a), prepared by ship's agents at Assab (132a), the entire shipment was loaded at Assab (136a). The vessel sailed directly to the port of New York, arriving at Pier 9A, Port Authority Terminal, Brooklyn, on 4 September 1971 (425a). Between 4 and 18 September 1971 Pittston, pursuant to a stevedoring contract with shipowner (497a), discharged a portion of the cargo for New York (424a et seq.). On 18 September 1971 the TORONTO sailed for Baltimore (439a) and discharged, in accordance with the manifest, some 483 tons of cargo destined for Baltimore (660a). Upon the TORONTO's return to the Port of New York on 22 September 1971, the remainder of the New York cargo was unloaded from the vessel by Pittston at Pier 9A (440a). As is cus-

tomary in the Port of New York, the bags of coffee were not counted or tallied as discharged from the vessel (178a).

The delivery routine for inbound cargo is described in Sauerbier, *Marine Cargo Operations* (1956):

> Inbound section. The above has been concerned with outbound cargo. Inbound cargo offers much less detail of work and hence a smaller staff is needed to handle it. The inbound freight traffic manager is concerned primarily with obtaining rapid and correct customs clearances for all cargo and sending out arrival notices to all consignees to insure prompt removal from the piers. The consignee is given a copy of the bill of lading which he presents at the customhouse. If all is in order, the customs office will issue the consignee a release which will authorize the customs office on the pier to release the goods. Following the issuance of the custom's release order, the consignee returns the bill of lading to the inward freight office where he receives a company release order for the shipment.
>
> When the cargo is discharged from the ship, it enters the control area of the chief delivery clerk, who is under the supervision of the terminal superintendent or pier superintendent. The delivery clerk is charged with receiving the cargo from the ship and then releasing it to the consignee or his agents according to a set legal procedure. When a trucker arrives at a pier to pick up cargo, he will have in his possession a release order. There are several types of releases. The release may be from the consignee of the cargo; in this case it is called a paid delivery release. In-transit releases are issued when the cargo is to be delivered to another carrier for transportation to the hinterland,

generally with the understanding that all customs and duty fees will be paid there. An entire shipment or only parts of a shipment may be taken to the U. S. Appraiser's Warehouse so that its value may be appraised to check on the duty required or for other reasons. When cargo is being picked up for delivery to the appraiser's warehouse, the customs will issue an appraiser's release order. This allows the cargo to be picked up and transported to the warehouse. Re-export releases are issued when the cargo is to be picked up for delivery to another pier where it will be loaded on another ship for re-export. If a free zone exists in the port, releases to the free zone will also be used.

Regardless of the type of release, the delivery routine is the same. The chief delivery clerk will have had a delivery book prepared from a copy of the ship's manifest some time before the consignees start calling for their cargo. In the delivery book, all the cargo is listed alphabetically by consignee. Each entry contains all the descriptive data concerning the cargo that would appear on the bill of lading. Another book that may be called a location book is kept by a clerk of the same office. The location book shows the location of each shipment on the pier after it has been discharged. The dock boss, under directions of the pier superintendent, designates the stowage location of all shipments discharged from the ship.

Upon arrival at the pier, the trucker proceeds to the delivery clerk's office and has his release papers checked. He then proceeds to the customs office on the dock and gets clearance permits from the customs. He returns to the delivery clerk

> where a checker is assigned to his truck. The clerk keeping the location book directs the checker and trucker to the point where the cargo is located. The checker checks the cargo onto the truck and makes out three copies of a tally slip. The trucker returns to the delivery office with one copy of the tally slip. A clerk checks the data on the tally slip with those appearing in the delivery book. If they are the same and all is in order, the delivery clerk will sign the tally slip and issue the trucker a gate pass, or the tally slip may be used as a gate pass. The trucker will also sign the delivery book indicating his approval of the checks made. When a given shipment has been completely delivered to the consignee or his agents, the word "completed" is stamped over the entry concerning the shipment in the delivery book. (pp. 11-12)

The foregoing is a fair version of the delivery routine delineated by the evidence and the witnesses at the trial.

On 27 and 28 September 1971 Davidson Transfer & Storage Co. (Davidson), the agents and truckers for the plaintiff, Sprague & Rhodes, accepted at the pier and signed the delivery book kept by Pittston for 2,039 bags of coffee with the identifying marks "A. B. Gimbi" carried under the bills of lading 5 and 6, Assab to New York option Baltimore (605a-606a). Upon arrival at the warehouse used by the plaintiff, Lehigh Distribution Center, Elizabeth, New Jersey, (Lehigh) Davidson first became aware that it had accepted from Pittston coffee with "wrong marks or some of the wrong marks" (155a). Davidson immediately advised shipowner's Inward Freight Manager by telephone that it had taken delivery of coffee from Pittston that was not consigned to its principal, plaintiff, Sprague & Rhodes, and told him that it was going to return the coffee which was still in its trucks

to Pittston at the pier. Shipowner's Inward Freight Manager "*suggested they put it in the warehouse, and then we could find out to whom it belonged, deliver it from the warehouse and mark the record accordingly*" (emphasis added) (156a). Pursuant to shipowner's suggestion the bags of coffee were put into Lehigh warehouse by Davidson for the account of shipowner (168a). Shipowner never did "mark the record accordingly." The Inward Freight Manager testified at the trial:

> Q. Did you make any arrangements for entries to be made in the delivery book maintained by Pittston to reflect this cross-delivery and the storage in the warehouse?
>
> A. Did I make any arrangements?
>
> Q. Yes.
>
> A. No, I did not. (167a)

The proper steps to correct a cross-delivery were described by shipowner's expert witness, Captain Wheeler as follows:

> A. Yes, sir. The cross-delivery would have to be corrected. There are two elements of a cross-delivery. They would have to be reconciled, recrossed and the customs would have to be notified, customs on the pier, and there would be quite a lot of—quite a few records would have to be reconciled or corrected.
>
> Q. In other words, the stevedore would have to find out what happened and change his book to indicate that?
>
> A. Yes. The cross has to be traced down and corrected or if it is the same commodity within the mutual consent of the consignees, if it is equal—like bags of coffee, they frequently will keep it, the proper number. (174a)

From 1 October 1971 through 29 November 1971 all normal activity at Pier 9A was stopped by a strike of longshoremen in New York Harbor (98a). On 1 December 1971 a surveyor instructed by the plaintiff visited Pier 9A, spoke to several people, examined the delivery book and noted that Davidson had taken delivery of 998 bags under bill of lading 5 and 1,041 bags under bill of lading 6 on 27 and 28 September 1976 (318a). On 9 December 1971 the surveyor visited Lehigh Distribution Center, Elizabeth, New Jersey (99a, 319a). An examination of the Lehigh receiving tallies showed that only 928 bags with the proper marks (A. B. Gimbi) had been received by Lehigh and that Lehigh had 1,011 bags with the marks A. B. Djimmas with the same certificate numbers (100a, 101a). The surveyor discussed the 1,011 bags with the shipowner and learned that the adverse marked bags were for another consignee, Carl Borchsenius (Exh. 16, 320a). He invited the shipowner to participate in a survey. The invitation was declined by the shipowner (101a, 102a). On 13 December 1971 the surveyor visited Pier 9A and saw about 268 bags with marks A. B. Gimbi (102a, 103a). On 22 December 1971 at the pier he saw about 142 bags with marks A. B. Gimbi (104a). On 22 December 1971 he discussed the matter with the shipowner and because the actual delivery records showed only a shortage of 60 bags he recommended an open delivery order be sent to the pier by the shipowner (104a, 105a, 325a). On 2 February 1972 the surveyor visited Pier 9A and confirmed the 390 bags of A. B. Gimbi were delivered by Pittston to the plaintiff pursuant to the open delivery order issued by the shipowner (105a, 325a).

On 15 October 1971 the plaintiff wrote to the shipowner (Exh. 11, 313a) and to Davidson (Exh. 12, 314a) stating:

> We have been advised by our weighers W. S. Force and Co., that 2,039 bags out of 2,099 bags on

the above captioned shipment were weighed on the dock and supposedly picked up by Davidson Transfer & Storage Company for storage at Lehigh Distribution Center in Elizabeth, New Jersey.

We have made numerous attempts with all parties involved to determine as fast possible how many bags were actually delivered to the warehouse to no avail. As of this date only 928 bags have been accounted for at the warehouse with the status of the balance still unknown.

This matter has been reported to our underwriters and we are hereby notifying you of our intent to file claim and hold you responsible for any losses, damages and-or expenses which are determined to be for your account.

We would appreciate your further cooperation resolving this situation.

On 23 December 1971, 12 bags were accepted under bill of lading 6 at the pier and signed for in the delivery book by the plaintiff's agents. On 6 January 1972, 42 bags were accepted under bill of lading 6 and signed for in the delivery book by the plaintiff's agents so that a total of 2,093 out of a total of 2,099 bags of coffee carried under bills of lading 5 and 6 were accepted at the pier and their receipt signed for by the plaintiff's agents in the delivery book maintained by Pittston (Exh. 54, 605a, 606a). In addition, the plaintiff took delivery of another 390 bags of coffee, marked A. B. Gimbi, pursuant to a special delivery order issued by shipowner (105a) pursuant to an arrangement by the surveyor representing the insurer of plaintiff's cargo made directly with shipowner, which is not reflected nor recorded in the delivery book kept by Pittston.

On or about 26 January 1972 shipowner received a formal claim from the plaintiff's insurer (Exh. 13, 315a).

On 28 March 1972 shipowner declined the claim of plaintiff and enclosed delivery records showing 2 and 6 bags short (Exh. 14, 316a; Exh. 65, at 681a). On 3 August 1972 the plaintiff brought suit against shipowner in the court below. On 22 March 1973 shipowner made a motion for an order permitting shipowner to implead Pittston. The motion was granted on 5 April 1973. The third-party summons and complaint was served on Pittston on 11 April 1973. The service of the third party complaint was the first notice to Pittston of the claim.

Shipowner did not divulge to Pittston until the trial below (1) that only 928 bags of coffee out of the 2,039 bags delivered to Davidson under bills of lading 5 and 6 on 27 and 28 September 1971 were the proper marks for the plaintiff, (2) that on or about 28 September 1971 it had taken control of 1,111* bags of coffee of the 2,039 bags and (3) that on or about 4 January 1972 it began issuing delivery orders for the bags of coffee warehoused for its account at Lehigh (Exh. 62, 658a; 165a). Shipowner's file relating to the storage and its disposition of the 1,111 bags of coffee was lost (161a). At the trial it was stipulated and the Court below found that the bags of coffee stored at Lehigh by shipowner were delivered to Carl Borchsenius, their consignee (192a). In addition, pursuant to delivery orders issued by shipowner, Carl Borchsenius also received at the pier and signed receipts in the delivery book kept by Pittston for 8,022 bags out of the total of 8,164 bags of Djimmas consigned to it in the TORONTO (Exh. 54, 577a, 607a, 608a, 609a, 610a; Exh. 56, 641a, 645a, 646a).

The stevedoring contract between Pittston and shipowner (277a) ended on 30 September 1972 (366a). The

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* The Court below found that 1,011 bags were stored at Lehigh (250a).

shipowner held up payment of $75,000 that it owed to Pittston (Exh. 34, at 370a) while its counsel negotiated with Pittston's claims manager the settlement of cargo claims. As a result on 13 November 1972 a release prepared by shipowner's counsel reciting payment of $46,339 by Pittston to the shipowner was signed by shipowner's counsel. By its terms Barber discharged and released Pittston from all claims arising by reason of:

> any damage or loss to the shipments of cargo included in the attached list marked Exhibit A, *and any other cargo claims filed against* [*shipowner*] *up to November 13, 1972* [emphasis added] . . . (Exh. 1, 277a).

POINT I

The action and inaction of the shipowner hindered and prevented Pittston from performing its work.

In *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 (1958) the Court held that a shipowner may have a claim against a stevedore for breach of an implied warranty of workmanlike performance "absent conduct on its part sufficient to preclude recovery." If the shipowner by some action or inaction has prevented, hampered, hindered or seriously handicapped the warrantor in performing its workmanlike job, the shipowner will be precluded from recovering indemnity, *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.*, 508 F. 2d 437 (CA2, 1974); *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (CA2, 1974); *Henry* v. *A/S Ocean*, 512 F. 2d 401 (CA2, 1975); *Waterman Steamship Corp.* v. *David*, 353 F. 2d 660 (CA5, 1965) cert. denied, 384 U.S. 972. Since the conduct of the shipowner prevented and obstructed Pittston from performing, the shipowner should be precluded from any recovery for the plaintiff's claim.

On 27 and 28 September 1971 at Pier 9A, Port Authority, Brooklyn, New York 1,111 bags of coffee out of 2,039 with the wrong mark "A. B. Djimmas" were inadvertently delivered by Pittston, and accepted by Davidson, plaintiff's agent, instead of 1,111 bags of coffee with the proper mark "A. B. Gimbi." Upon arrival at the Lehigh Terminal at Elizabeth, New Jersey, Davidson discovered the error (155a). Davidson immediately reported the mix-up to the shipowner by telephone and said that the bags of coffee were still in its trucks and that it was going to return the bags of coffee to Pittston. At the suggestion of the shipowner the bags of coffee were not returned to Pittston, but were stored for the account of the shipowner at Lehigh (156a). The records of the shipowner relating to its disposition of the 1,111 bags of coffee were lost (120a, 121a, 161a). Counsel for the shipowner stipulated at the trial that all the bags stored at Lehigh were delivered to Carl Borchsenius (192a). According to the receipted delivery book, Carl Borchsenius also took delivery from Pittston of 8,022 bags out of a total of 8,164 bags of coffee with the mark "A. B. Djimmas" (Exh. 54, 577a, 607a, 608a, 609a, 610a, Exh. 56, 641a, 645a, 646a). Accepting the stipulation of shipowner's counsel and the delivery records, it would appear that Carl Borchsenius received a total of 9,133 bags or 969 bags more than were consigned to it in the TORONTO. The following action and inaction by the shipowner hindered and prevented Pittston from performing its work:

1. It stopped Davidson from returning the 1,111 bags of A. B. Djimmas coffee to Pittston (156a).

2. It took control of the 1,111 bags of coffee, marked A. B. Djimmas (168a).

3. It did not inform Pittston until 1 July 1976 during the trial that on 28 September 1971 it took the 1,111 bags and stored them at Lehigh (195a).

4. It did not "mark the record accordingly" or make any arrangements for entries to be made in the delivery book maintained by Pittston to reflect the cross-delivery and the storage in the warehouse (156a, 167a).

5. It did not stop or change the delivery orders or releases it issued to Carl Borchsenius to reflect the delivery of 1,111 bags of coffee to Carl Borchsenius from Lehigh. Accordingly, Pittston continued to honor the delivery orders issued by shipowner to Carl Borchsenius during December 1971 and January 1972 with the result (accepting shipowner's counsel's stipulation) that Carl Borchsenius apparently received a windfall of 969 bags of coffee (Exh. 54, 577a, 607a, 608a, 609a, 610).

6. It did not advise Pittston of the claim of plaintiff, dated 15 October 1971, that plaintiff had received only 928 bags out of 2,099 bags (Exh. 11, 313a).

7. It did not pass on to Pittston the invitation of plaintiff's cargo surveyor to participate in a survey (101a, 102a).

8. It declined to participate in the survey suggested by the plaintiff (102a).

9. It did not advise Pittston of the formal claim that it received in January 1972 from plaintiff's insurer and its declination of the claim on 28 March 1972 (Exh. 13, 315a; Exh. 14, 316a; Exh. 65, 681a).

The shipowner's actions and inactions were wrongful conduct. See Restatement, 1 Contracts §§262, 295, 315 and Restatement, Contracts 2d, Tentative Drafts, §231. Pittston should be discharged from any obligation relating to the plaintiff's claim.

POINT II

The shipowner's release of Pittston included the claim of the plaintiff.

There is no evidence of fraud on the part of Pittston (233a) or incompetence of the party signing the release for shipowner (227a). A valid release is an absolute bar to recovery for everything included in the release, and it should only be set aside in the presence of clear, precise and indubitable evidence of fraud, accidental means or incompetence of the party who is alleged to have signed it. *Mannke* v. *Benjamin Moore & Company,* 375 F. 2d 281, 285 (CA3, 1967). No duress, illegality, fraud or mutual mistake has been claimed or proven in the execution of the release. There is no statutory or common law provision or policy prohibiting voluntary release of a cause of action; duress, illegality, fraud or mutual mistake must be established or else the release stands. *Mangini* v. *McClurg,* 24 N.Y. 2d 556, 563 (1969). There is no evidence of mutual mistake by the parties negotiating the release. Mistake as to future unknowable effect of existing facts is insufficient to set aside a release. A mistake by one party to a release, unless accompanied by fraud or misrepresentation or other inequitable conduct by the other party is insufficient to avoid a release; the mistake must be mutual [in order to avoid the release], *Robles* v. *Trinidad Corp.,* 270 F. Supp. 570, 575 and 577 (SDNY, 1966).

The release was prepared by counsel for shipowner (203a-204a) and should be strictly construed against the party who drafted it, 66 *Am. Jur.* 2d, *Release,* §28, at 705. Counsel for shipowner had authority to execute the release (214a). The express wording of the release covers the action at bar. Where a release is given in terms that are broad enough to cover a certain cause of action, extrinsic evidence should not be received to show that the

release did not in fact relate to and was not intended to discharge such a cause of action. *Ibid* §52, at 730. A party claiming that a general release is not intended to cover loss for which claim is being asserted has the burden to rebut the explicit language of the release and corroborating testimony of party claiming a release, *Sears, Roebuck and Co.* v. *Jardel Co.*, 421 F. 2d 1048, 1053 (CA 3, 1970). The pertinent language (Exh. 1, 278a) released and forever discharged Pittston from any liability for "cargo claims filed against [shipowner] up to November 13, 1972." At the trial, Pittston objected to parol evidence as to the meaning of the release, on the ground the release was prepared by their [shipowner's] counsel, signed by their counsel. It is plain, clear, unambiguous." The Court reserved its ruling on Pittston's objection (197a) and permitted parol testimony. Shipowner called as its witnesses the two attorneys who had negotiated the settlement of cargo claims in November 1972 with Pittston's Claims Manager, Miss O'Keefe. Miss O'Keefe was unavailable as a witness, having retired from Pittston approximately a year before the trial and, since then, residing outside the subpoena jurisdiction of the court (236a).

Counsel for shipowner testified (198a-199a) that the words "cargo claims", quoted above, meant instances in which shipowner had been presented with claims for cargo damage in New York, that shipowner had these claims in its office and there was a possibility of a claim-over against Pittston, and further, that they were not lawsuits. Shipowner's counsel asserted that the words "cargo claims" used in the release, did not include claims in which a lawsuit had already been instituted, because (1) none of the claims listed on the list attached to the release was a lawsuit (202a), and (2) that the release was never intended to release a certain pending lawsuit, referred to as the FERNFIELD (206a-207a). In fact, one "claim" on the list (No. 50, Exh. 1, at 283a, TAGATAY) was in litigation

at the time (227a-230a) and prior to the release it was known by both shipowner and Pittston to be in suit (Exh. 7, 306a-307a). The FERNFIELD was a lawsuit in which shipowner had impleaded Pittston as a third party and which the shipowner and Pittston were actively defending (218a). At the time of the release, the plaintiff's claim was in litigation against shipowner only, without Pittston as a party, and without Pittston's knowledge of it either as a claim or as a lawsuit.

The circumstances leading up to the release were that the contract between Pittston and shipowner, under which the former performed stevedoring and terminal operation services for the latter, was about to expire. Shipowner was not going to renew the contract (199a) and instructed its counsel to negotiate settlement of all cargo claims of shipowner against Pittston. The shipowner collected the material in its office for the settlement discussions between its counsel and Pittston (200a). A letter from shipowner to its counsel (Exh. 2, 284a, et seq.) sets forth 43 typewritten claims against Pittston that shipowner had compiled as of 3 October 1972. Miss O'Keefe advised counsel that she wanted it absolutely certain that besides the claims that were on the typewritten list there were no other outstanding claims against Pittston (210a). Counsel's further request to shipowner raised five more claims, Nos. 44, 45, 46, 47 and 48 (Exh. 2, at 291a). A letter from counsel to Shipowners Claims Bureau, dated November 10, 1972 (Exh. 37, 375a et seq.) reported that the negotiators had at that date arrived at the proposed settlement of 48 claims for $45,000; however, counsel advised (379a) that they had "called to the stevedore's attention 4 additional claims referred to us recently" which "had apparently been previously overlooked by both sides." These are the four claims which became Nos. 49, 50, 51 and 52 on the list attached to the release signed on 13 November

1972 (Exh. 1, 281a-283a), and which necessitated increasing the consideration for the release by $1,339.00, or from $45,000 to $46,339 (222a, 223a). No. 50 was the TAGATAY claim which counsel for shipowner continued to defend after the settlement (714a). Counsel for shipowner testified (223a) that Miss O'Keefe said: "Now, look, I don't want your client to start pulling out other files from their office, other claims. I want to be assured this is it, that they don't have any more." Counsel testified that when the shipowner came up with 4 or 5 additional claims from their office, Miss O'Keefe said she wanted no more claims coming out of the woodwork: "So we agreed on this language ["and any other cargo claims filed against (shipowner) up to November 13, 1972"]. She initiated it but I agreed to it, and the language specifically refers to claims." (225a). Despite the assertion of counsel at the trial that the word "claims" excludes lawsuits, there is no evidence, either in the trial testimony of counsel, or in any of the exhibits introduced at the trial relating to the release, that the negotiators had ever discussed, inter se, and excluded "lawsuits" from "any other claims filed against [shipowner] up to November 13, 1972." The Court said (263a): "The attorneys further testified that, to parties in the industry involved in such negotiations, the distinction between a 'cargo claim' and a claim that has become the subject of a lawsuit—as was the matter involved herein—is clear enough." Pittston submits that there is a clear distinction between a matter in which both shipowner and Pittston are represented by their lawyers in an active lawsuit and a matter in which suit is pending against shipowner but in which no suit or claim has been filed against Pittston. The latter is included in "any other cargo claims" and the former is not. Further in the release shipowner "agrees to indemnify, defend and hold harmless" Pittston, "up to the amount of the payment set forth above from and against any

claims, demands, suits or actions made or brought against them [Pittston] by any third party by reason of the loss or damage to shipment[s] referred to on the attached list." (278a). Plaintiff's claim was not on the list and would not be included in this "hold harmless" agreement. Since the "hold harmless" agreement refers only to actions brought against Pittston by a third party, as, for example, a consignee, it is immaterial here.

The words "and any other cargo claims filed against [shipowner] up to November 13, 1972" include plaintiff's claim for shortage of bags of coffee filed with shipowner prior to 13 November 1972, and which, unknown to Pittston, was already in litigation between plaintiff and shipowner. The intent is set forth in counsel's letter to shipowner, dated 13 November 1972, (Exh. 10; 311a, 312a)

> Miss O'Keefe was concerned about your discovering any additional claims in the old files (like the four that were found at the last minute) and it was agreed that the Release would cover all cargo claims filed against Barber up to today's date, November 13, 1972. In other words, if you discover any old claims in your files now, they will have been released. On the other hand, any claims which are received after this date and which may involve Pittston will not have been released and will be treated separately.

The last sentence quoted: "On the other hand, any claims which are *received* [italics added] after this date (13 November 1972) and which may involve Pittston will not have been released and will be treated separately", shows clearly that it was shipowner's intention, as well as Pittston's, not to release claims arising after 13 November 1972. Plaintiff's claim was presented to the shipowner on 15 October 1971 (313a).

Counsel for shipowner testified (223a-224a) that at the time of the release, there was no realization that the plaintiff's suit was a valid shortage claim instead of a "nuisance case". Shipowner accepted from the plaintiff's agent and stored at the Lehigh warehouse more than 1,000 bags of coffee which Pittston had delivered to the plaintiff's agent. Counsel for shipowner averred that at the time the release was signed "there was no way of our knowing before that, that we had or Barber had a claim against Pittston because of the document that Pittston had furnished to us." (233a). Pittston's delivery records were not marked by the shipowner to show the warehousing and subsequent disposition of the bags of coffee at Lehigh by the shipowner (167a). The purported lack of knowledge by shipowner and its attorneys is refuted by the letter from plaintiff to shipowner, dated 15 October 1971 (Exh. 11, 313a), and, especially by the divulging for the first time at trial that the shipowner had arranged for the A. B. Djimmas coffee, erroneously picked up at the pier by plaintiff's trucker, to be stored for its account at Lehigh and then delivered to another coffee consignee, Carl Borchsenius (156a, 165a; Exh. 62, 658a) in or about January 1972.

It is uncontroverted that when the settlement negotiations were taking place prior to and in November 1972, when the settlement checks were exchanged by shipowner and Pittston, and when shipowner's attorney signed and delivered the release, neither Miss O'Keefe nor anyone else at Pittston knew of the plaintiff's claim and the lawsuit pending against the shipowner (232a, 233a). Counsel's statement (233a) "someone at Pittston who knew that there was a huge cross-delivery, [who] nevertheless prepared a document that showed only six short" is clearly wrong. Shipowner's unsupported testimony (167a) that it told someone at Pittston in a telephone conversation that there had been a cross-delivery, and the surveyor's

testimony (97a, et seq.; Exh. 16, 318a et seq. and Exh. 17, 322a et seq.) that he discussed the delivery of the coffee with pier personnel, does not support a conclusion that Pittston wrongly prepared a document that showed only six short. The Over, Short and Damage Report (Exh. 21, 335a; Exh. 46, 412a) dated 5 January 1972, prepared by Pittston accurately summarized the delivery book signed by the representatives of the various consignees (Exh. 54, 510a, et seq.). The delivery book entries were wrong only because the shipowner neither advised Pittston that it had taken the 1,111 bags nor did it *"mark the record accordingly"* (156a, 167a).

There is no dispute that it was the intention of the parties on 13 November 1972 to release and discharge Pittston from liability for certain listed cargo claims, and, in addition, at the request of Miss O'Keefe and with the concurrence of shipowner's counsel, to discharge Pittston from liability for indemnity to shipowner with respect to matters in which cargo interests had filed claims against shipowner, and for which shipowner at some future time could seek indemnity from Pittston. A general release usually includes only claims in existence at the time it is executed, but it may also bar contingent and future claims when the intent of the parties to that effect is clear. *Rotberg* v. *Dodwell & Co.,* 152 F.2d 100, 101 (CA2, 1945). Although shipowner's counsel asserted at the trial that the release was not intended to discharge Pittston from liability for any claim which was a lawsuit against the shipowner, there is no evidence that such a distinction was voiced or conveyed to Miss O'Keefe at the time of the release or that the distinction was to be applied to lawsuits unknown to Pittston. As stated in *United States* v. *Lennox Metal Manufacturing Co.,* 225 F.2d 302, 314 (CA2, 1955):

> The court will give legal effect to the words of a contract in accordance with the meaning actually given to them by one of the parties, *if the other knew or had reason to know that he did so.* (emphasis added)

The Court below, in permitting the introduction of parol evidence, followed *Estate of Anton L. Trunk* v. *Commissioner of Internal Revenue,* Docket No. 76-4125 (CA2, February 2, 1977) which, at 1658, states:

> . . . and we have permitted declarations of intention to be considered in cases involving contractual interpretation. *Asheville Mica Co.* v. *Commodity Credit Corp.,* 335 F.2d 768, 771 (2d Cir. 1964).

No declaration of its now declared intention was made by shipowner's negotiating counsel contemporaneously with the negotiating. The Court below (261a) quoted *United States* v. *Lennox Metal Manufacturing Co., supra,* at 314, quoting 3 Corbin, Contracts 45 (1951), i.e.

> . . . the court should be advised of all the surrounding circumstances; of the meaning that is given [to] the language of the agreement by common usage, by usage in the trade or business or profession of the parties; of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and practical application by either party that is assented to or acted upon by the other.

The requirement of mutuality is essential. It is significant that by "common usage", "by usage in the trade or business or profession of the parties", and even by the nomenclature of the judiciary, the word "claim" is often

used interchangeably for "lawsuit". For example, the Court below (263a) referred to the FERNFIELD as "a major *claim* [emphasis added] involving both parties that was pending—in the courts—prior to November 13, 1972." (263a). At the time of the release, the plaintiff's matter was not a lawsuit vis-a-vis shipowner and Pittston, so that Pittston's not invoking the release defense in the FERNFIELD is of no help in interpreting the intent of the parties as to matters such as plaintiff's claim.

It was Pittston's contention that the release was "plain, clear, unambiguous" (197a). Over the objection of Pittston's counsel to the admission of parol evidence, the Court below permitted the shipowner to call as witnesses the two attorneys who had negotiated the settlement and release on behalf of the shipowner (197a-236a). Miss O'Keefe, the negotiator on behalf of Pittston, was equally unavailable to both parties, inasmuch as she had, a year since, retired from Pittston's employ, and no longer lived within the subpoena jurisdiction of the court. Her deposition testimony, taken by shipowner's counsel, was equally available to both parties. Pittston's counsel pointed out to the Court that shipowner's counsel could, if he wished, put in her deposition, and the Court concurred. Shipowner's counsel declined to do so. Pittston elected not to do so (236a). In its opinion the Court below noted that Pittston's "failure" to call Miss O'Keefe "provides at least some added grace to the posture assumed by third party plaintiff" (263a). If any inference were to be drawn, it should be adverse to shipowner, who declined to offer the transcript of Miss O'Keefe's deposition. In *United States* v. *Super,* 492 F.2d 319, 323 (CA 2, 1974), *cert. den.* 419 U.S. 876, the principle was enunciated that no inference is to be drawn when the witness is equally unavailable. See also Wigmore On Evidence §286 (3d ed. 1940).

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

SYMMERS, FISH & WARNER,
Attorneys for Third Party Defendant-Appellant, Pittston Stevedoring Corp.,
345 Park Avenue,
New York, New York 10022.
(212) 751-6400

Dated: New York, New York,
27 June 1977.

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Attorney for

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Attorney for

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